

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 15, 2014

v

EMMANNUAL PARAVAS,  
  
Defendant-Appellant.

No. 311291  
Wayne Circuit Court  
LC No. 11-007519-FH

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Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of the common-law offense of misconduct in office, MCL 750.505. He was sentenced to serve one to five years in prison. He appeals as of right. We affirm.

**I. BACKGROUND**

The evidence at trial showed that defendant was on duty as a police officer with the Southgate Police Department when he responded to a domestic violence situation at the La Quinta Inn. When he arrived there, he saw an upset woman being comforted by the desk clerk. The woman's husband came into the lobby shortly thereafter. Defendant was able to determine that no violence had occurred at that particular time, although the husband had some scratch marks at the back of his neck that appeared to be scabbing over. He observed the woman to be very intoxicated. All of the police officers on patrol in Southgate that evening had responded to the dispatch. However, since defendant had arrived at the scene first, he interviewed the parties and decided not to arrest anyone but to remove the woman to another hotel, so that both she and her husband could have a cooling off period. Defendant discussed this plan with his supervisor who acquiesced. All of the witnesses testified that the woman appeared to be very intoxicated at that time. The woman testified that she had been drinking for hours and could not remember many of the events that evening. Before the dispatch for the domestic altercation at the La Quinta Inn, defendant had previously encountered the husband at a nearby gas station and assisted the husband by driving him to a bar where the woman had left their car. The husband then informed defendant that his wife was an adult entertainer.

Defendant had the husband retrieve the woman's personal belongings, including her purse. Defendant then escorted the woman to the Holiday Inn, which was nearby. Defendant assisted as the woman checked into the hotel and received two card keys to her room. Defendant

then escorted her to the room and told her to shower and get some sleep, and that she would see her husband in the morning. Defendant went back to the La Quinta Inn and spoke to the husband, requesting money which the wife wanted so she could purchase something to drink. He also checked whether the husband had received any calls or texts from his wife. Defendant then returned to the Holiday Inn, retrieved some condoms from his squad car, and entered the woman's room using one of the card keys that the woman had received when she checked into the hotel. The woman was lying in bed without any clothes on and she sat up when defendant entered the room. Defendant placed a black case, which the woman thought was a gun holster and defendant testified was a radio, on the dresser. While in the room, defendant and the woman engaged in sexual intercourse for a few minutes. The complainant testified that defendant threatened her and handcuffed her before the sexual intercourse. Defendant testified that the woman had propositioned him.

Defendant was charged with third-degree criminal sexual conduct, MCL 750.520d, common-law misconduct in office, MCL 750.505, and willful neglect of duty by a public officer, MCL 750.478. The jury found defendant guilty of misconduct in office but acquitted him of the other two charges. Before trial, defendant filed a motion to dismiss the misconduct in office charge, which was denied by the trial court. During trial, before his testimony, defendant moved for a directed verdict on the misconduct in office charge. This motion was denied. After his conviction, defendant moved for a directed verdict of acquittal, but this motion was also denied. The court exceeded the statutory guidelines and sentenced defendant to one to five years in prison.

## II. COMMON-LAW OFFENSE OF MISCONDUCT IN OFFICE

Defendant argues that the trial court erred by failing to dismiss the charge of misconduct in office because (1) the alleged misconduct by defendant was the failure to arrest the complainant for domestic violence and having coerced the complaint to engage in sexual activity while on duty, and this conduct was punishable under the other statutory charges of third-degree criminal sexual conduct and willful neglect of duty, (2) defendant did not have fair warning that he could be criminally responsible for the alleged acts, and (3) he was denied the assurance of a unanimous verdict because the jury should have been instructed that they must unanimously agree which act constituted the crime.

Whether defendant could properly be charged with the common-law offense of misconduct in office, as well as the statutory offenses of third-degree criminal sexual conduct and willful neglect of duty, presents a question of law that is reviewed de novo. *People v Coutu*, 459 Mich 348, 353; 589 NW2d 458 (1999). This Court reviews de novo a trial court's decision on a motion for directed verdict. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A directed verdict of acquittal is appropriate only if, considering the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond reasonable doubt." *People v Mehall*, 454 Mich 1, 6-7; 557 NW2d 110 (1997).

Defendant does not contest that misconduct in office by a law enforcement officer is an indictable offense at common law. *Coutu*, 459 Mich at 353-355. In *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), our Supreme Court stated:

At common law, misconduct in office was defined as “corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.” *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), . . . quoting Perkins & Boyce, Criminal Law (3d ed), p 543. An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance.

To establish the offense of misconduct in office, the prosecutor must prove that (1) the defendant is a public officer, (2) the misconduct occurred in the exercise of the duties of the office or were done under the color of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts constituted corrupt behavior. *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (1999). Corruption, as an element of misconduct in office, is used in the “sense of depravity, perversion, or taint.” *Perkins*, 468 Mich at 456, quoting Perkins & Boyce, Criminal Law (3d ed), p 542. “[A] corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer.” *People v Coutu (On Remand)*, 235 Mich App 695, 706; 599 NW2d 556 (1999).

Here, it is undisputed that defendant was a public officer and that misconduct toward the complainant occurred during the exercise of defendant’s duties as a police officer or under the color of the office. Defendant was a police officer who had responded to a dispatch to a domestic dispute at the La Quinta Inn in Southgate. After defendant determined that there was not probable cause to arrest either the complainant or her husband, defendant removed the complainant to another hotel so the parties could cool down. All the witnesses testified that the complainant appeared to be very intoxicated. Defendant assisted the complainant in registering at the front desk and escorted her to her room. Two room keys were given to the complainant. At some point defendant received possession of one of the room keys and used the key to enter the complainant’s room. After entering the complainant’s room, defendant engaged in sexual intercourse with her.

MCL 750.505 provides:

Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than \$10,000.00, or both in the discretion of the court.

Accordingly, if the elements of any statutory offense are the same as the common-law offense of misconduct in office, a defendant cannot be charged with or convicted of misconduct in office. If a defendant is charged with violating a statute whose elements differ from misconduct in office, the defendant is not facing prosecution and punishment for the same behavior if he is also charged with misconduct in office. *People v Thomas*, 438 Mich 448, 453; 475 NW2d 268 (1991); *People v Milton*, 257 Mich App 467, 472; 668 NW2d 387 (2004).

In this case, defendant was also charged with the statutory offenses of third-degree criminal sexual conduct, MCL 750.520d, and willful neglect of duty, MCL 750.478. The elements of these charges are not the same as the elements of misconduct in office. MCL 750.520d provides that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and any of certain proscribed circumstances exist, including:

(b) Force or coercion is used to accomplish the sexual penetration. . . .

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

It is clear that the elements of the common-law offense of misconduct in office are not the same as those of third-degree criminal sexual conduct. The jury acquitted defendant of this offense, either because it could not unanimously find beyond a reasonable doubt that the sexual activity was forced or coerced as the complainant testified, or because it believed that the sexual conduct was consensual as defendant testified.

The crime of willful neglect of duty is set forth in MCL 750.478, which provides:

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.

The elements of the common-law offense of misconduct in office are not the same as those of statutory willful neglect of duty. Defendant cites *People v Waterstone*, 296 Mich App 121; 818 NW2d 432 (2012), but that opinion is not inconsistent with the trial court's decision in this case. In *Waterstone*, this Court found that it was improper to charge the defendant with misconduct in office under MCL 750.505 because she was accused of failure to do something required by her office (nonfeasance), which was prosecutable as a willful neglect of duty under MCL 750.478. In this case, the conduct forming the basis of the charge of common-law misconduct in office was not defendant's mere failure to arrest the complainant on the charge of domestic violence. Indeed, the evidence showed that the Southgate police department allowed officers discretion in deciding whether to arrest in a domestic violence situation. Rather, defendant's conduct that formed the basis of the charge of common-law misconduct in office was engaging in sexual activities while on duty with an individual defendant was charged with protecting.

Defendant's argument that he did not have notice that his conduct could result in a charge of misconduct in office is without merit. In response to his motion to dismiss before trial, plaintiff's brief clearly set forth the acts that resulted in the misconduct in office charge. In addition, while defendant argues that the sexual activity was consensual, there is no question that he engaged in sexual activities while on duty with an extremely intoxicated individual that he had been charged to protect. This case is clearly distinguishable from *Perkins*, where there was

no nexus between the police officer's status and duty as police officer and his sexual conduct with a prior acquaintance while on duty.

Defendant next argues that the misconduct in office conviction should be vacated because the charge was duplicitous, joined separate offenses in a single count, and may have resulted in a verdict that was not unanimous. This Court reviews de novo constitutional issues. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009). Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Unpreserved claims regarding jury instructions are reviewed to determine whether relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992).

"An indictment is duplicitous if it 'joins in a single count two or more distinct and separate offenses.'" *United States v Campbell*, 279 F3d 392, 398 (CA 6, 2002), quoting *United States v Shumpert Hood*, 210 F3d 660, 662 (CA 6, 2000). "The vice of duplicity is that a 'jury may find a defendant guilty on the count without having reached a unanimous verdict on the commission of any particular offense.'" *Campbell*, 279 F3d at 398, quoting *Shumpert Hood*, 210 F3d at 662. "By collapsing separate offenses into a single count, duplicitous indictments 'prevent the jury from convicting on one offense and acquitting on another.' Therefore, duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity." *Campbell*, 279 F3d at 398, quoting *Shumpert Hood*, 210 F3d at 662.

Criminal defendants are entitled to a unanimous verdict. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 285 (1994). It is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967); see also *Cooks*, 446 Mich at 511. In this case, the trial court instructed the jury that its verdict must be unanimous. Defendant argues that the jury verdict may not have been unanimous because the misconduct in office charge encompassed a variety of possible actions. In this case, the jury was instructed on three theories of misconduct in office—malfeasance, misfeasance, and nonfeasance. Since nonfeasance was covered under the charge of willful neglect of duty, instructing the jury in this way might have constituted error. However reversal is warranted only if after an examination of the entire case, it appears more probable than not that the error was outcome determinative. *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013).

In *Cooks*, 446 Mich at 530, our Supreme Court stated, "[W]hen the state offers evidence of multiple acts by a defendant, . . . the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." In this case, the prosecution made it clear that the misconduct in office charge referred to defendant's conduct, while acting under color of his office and having been charged with protecting the complainant, of removing the complainant to another hotel, retrieving condoms from his car, entering the complainant's hotel room with one of the two keys given to her when she checked into the hotel, and having sex with her. Defendant was separately charged with willful neglect of duty based on the allegation that he had a duty to arrest complainant rather than remove her to another hotel. Defendant was also separately charged with third-degree criminal

sexual conduct based on the complainant's allegation that the sex was forced or coerced by defendant.

The trial court did instruct the jury that its verdict must be unanimous. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant's argument that the jury instructions should have gone further is without merit.

In sum, we conclude that the trial court properly refused to dismiss the charge of common-law misconduct in office and properly denied defendant's motions for a directed verdict of acquittal.

### III. SENTENCING

Defendant also challenges the trial court's scoring of Offense Variables (OVs) 1, 3, 4, and 10, as well as the court's decision to upwardly depart from the sentencing guidelines in this case.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

We review for clear error whether a given reason justifies an upward departure from the sentencing guidelines range. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Whether a reason is objective and verifiable is reviewed de novo; whether a reason is substantial and compelling is reviewed for an abuse of discretion. *Id.* The extent of the departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

The trial court may assess five points for OV 1 if "a weapon was displayed or implied." MCL 777.31(1)(e). In scoring five points, the trial court correctly determined that a weapon was displayed or implied. At trial, the complainant testified that she saw defendant remove something that she believed to be a gun holster and place it on the dresser. In addition, defendant testified that the complainant attempted to remove his gun belt and that he removed it himself and placed it on the bed behind him. Defendant was in full uniform at the time that he entered the room and he was on duty at the time. It was reasonable to conclude that he was carrying a gun when he entered the complainant's hotel room.

Five points may be assessed for OV 3 when "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The complainant testified that she was handcuffed by defendant and that she was wiggling her left hand out of the handcuff. She further stated that when defendant saw this, he tightened the handcuff around her wrist and when the handcuff was removed, she had a red mark on her wrist where the handcuff had been. The trial court did not err by assessing five points for OV 3.

Ten points may be assessed for OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(b). The fact that treatment has not

been sought is not conclusive. MCL 777.34(2). In the letter that the complainant sent to the trial court before sentencing, she stated that she was receiving professional psychological treatment as a result of the incident with defendant. This information was sufficient to justify the trial court's assessment of ten points for OV 4.

OV 10 pertains to the exploitation of a vulnerable victim. If predatory conduct was involved, 15 points may be assessed. MCL 777.40(1)(a) "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In this case, defendant drove the complainant, who he knew was intoxicated, to another hotel, helped her check in, observed her receiving two room keys from the clerk at the front desk, and escorted her to the room. Somewhere along the way, defendant obtained possession of one of the room keys, retrieved condoms from his car, and used the room key to enter the complainant's room. The trial court did not err by finding that this activity constituted predatory conduct. The court properly assessed 15 points for OV 10.

Defendant challenges the trial court's decision to upwardly depart from the sentencing guidelines score of zero to eleven months. In general, to justify a departure from the sentencing guidelines, the sentencing court must articulate on the record one or more substantial and compelling reasons for the departure. MCL 769.34(3). A "substantial and compelling" reason is "an objective and verifiable reason that keenly and irresistibly grabs [the court's] attention" and "is of considerable worth in deciding the length of a sentence." *Babcock*, 469 Mich at 258. "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008).

The trial court did not err by determining that there were objective and verifiable reasons that were not adequately considered in the scoring of the guidelines, and did not abuse its discretion by determining that these reasons justified an upward departure from the recommended minimum sentence range. In justifying its departure from the guidelines, the trial court stated that defendant took an oath to serve and protect the public. Defendant was on duty and took advantage of a citizen whom he had sworn to protect while she was inebriated and obviously vulnerable. The trial court stated that defendant masterminded a "grander plan" by taking the complainant to another hotel away from her husband, checking her into the hotel, and obtaining two room keys. Defendant told the complainant to shower and get herself ready for bed. He then went back to the other hotel to check on the complainant's husband and obtain money for the complainant. Defendant preyed upon a vulnerable person who was deserving of protection from the law enforcement community even if others might not respect the work she did as an adult entertainer. The trial court also stated that defendant brought shame to the whole law enforcement community and that this was the type of conduct that resulted in the public not trusting police officers. The trial court was troubled that defendant did not admit to having sex with the complainant when he was first confronted by the state police. The trial court further concluded that OV 10 did not properly account for the seriousness of the conduct because a citizen was taken advantage of by a law enforcement officer who was on duty and should have protected her.

The trial court's reasons for departure were objective and verifiable by evidence in the trial and sentencing record. *People v Anderson*, 298 Mich App 178, 185; 825 NW2d 678 (2012).

We conclude that the court articulated sufficient substantial and compelling reasons to depart from the sentencing guidelines in this case. Furthermore, the extent of the departure did not constitute an abuse of discretion.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen